United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1637

~~74 - 1367~~

To be argued by
MARSHALL G. KAPLAN

UNITED STATES COURT OF APPEALS

For the Second Circuit

FRANCIS J. LANGFORD, individually, and as natural guardian of Frank P. Langford, an infant,

Plaintiff-Appellee,

-against-

CHRYSLER MOTORS CORP.,

Defendant-Appellant,

and

WOODBRIDGE DODGE, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of New York.

BRIEF OF PLAINTIFF-APPELLEE

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Cases Cited.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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FRANCIS J. LANGFORD, individually and as natural guardian of FRANK P. LANGFORD, an infant,

Plaintiff-Appellee,

-against-

CHRYSLER MOTORS CORP.,

Defendant-Appellant,

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WOODBRIDGE DODGE, INC.,

Defendant-Appellee.

Docket No. 74-1367

On Appeal from the United States District Court for the Eastern District of New York.

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BRIEF OF PLAINTIFF-APPELLEE

Defendant Chrysler Motors Corp., alone, appeals from a judgment of the Eastern District, Mark A. Costantino, U.S.D.J., rendered after a bench trial (373 F. Supp. 1250). This diversity founded action was brought by plaintiff as natural guardian of his infant son and on his own behalf to recover damages for personal injuries and medical expenses incurred as the result of a collision caused by a defective steering apparatus in a 1971 Dodge automobile manufactured by appellant and sold by co-defendant Woodbridge Dodge, Inc.

The findings of fact and conclusions of law, Fed. R. Civ. P. 52 (a) are reproduced at page 170,* et. seq. Judge Costantino awarded the infant $9,000.00 for his injuries, pain and suffering and $1,420.70 to the plaintiff father to recompense him for monies expended for the infant's hospitalization.

The judgment was rendered against both defendants with Woodbridge being allowed full indemnification over and against Chrysler. Woodbridge has not appealed from the judgment.

Although appellant has tendered what it considered to be a number of "issues", only two questions are presented:

1. Was Chrysler Motors Corp. the manufacturer of the car in question?

2. Has Judge Costantino complied with the requirements of Fed. R. Civ. P. 52 (a)?

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*Refers to appendix.

POINT I

JUDGMENT WAS PROPERLY RENDERED AGAINST CHRYSLER MOTORS CORP.

The complaint alleged Chrysler manufactured the Dodge (4). Although denied (7), Chrysler nevertheless cross-claimed against Woodbridge and counterclaimed against plaintiff (9-10). Woodbridge admitted that Chrysler was the manufacturer by failure to deny (11). Fed. R. Civ. P. 8 (d). It then filed cross-complaints against Chrysler and alleged, inter alia, that Chrysler manufactured the car (11-15) (par. 8 at page 12). Each defendant answered the other's cross-complaint. Woodbridge's pleading is reproduced (16) but Chrysler's is not printed in the appendix prepared by Chrysler. In answer to Woodbridge's cross-complaint, however, Chrysler denied manufacturing the vehicle in question but did admit that it was engaged in the sale of motor vehicles and was and is engaged in the design, manufacture and distribution of motor vehicles (pars. 5, 6, 7 at page 12).

With the pleadings in the posture described, Judge Zavatt held a pre-trial conference on March 26, 1973. As a result, he made an order which recited at page 3 of his transcribed directions:

> "The plaintiff is suing Woodbridge, the dealer, and Chrysler Motors Corporation, the manufacturer, claiming negligence in design and construction and breach of warranty."

This recital was dictated in the presence of counsel and elicited no protest of any kind from Chrysler's attorney. He did not seek to correct Judge Zavatt or call his attention to a contrary state of facts. Nor did he ever seek relief of any kind from this order.

The case thereafter proceeded to trial. Chrysler defended vigorously, produced witnesses, including two engineers brought in from Michigan and pressed its cross-complaint and counterclaim. The record is barren of any contention that Chrysler Motors Corp. was not the manufacturer. This is true right up to the final motions (169). This claim was raised for the first time in Chrysler's post-trial memorandum.

Judge Costantino had by then devoted two trial days to this matter under the manifest assumption that Chrysler Motors Corp. had manufactured the car (see the Court's remark at page 80, for example) without any objection of any kind from Chrysler's counsel or any attempt by him to call the Judge's attention to a mistake.

On this record, the "wrong defendant" claim is not only specious but represents the dubious type of advocacy which earned this Court's condemnation in Fluoro Electric Corp. v. Branford Associates, 489 F. 2d 320.

POINT II

JUDGE COSTANTINO'S OPINION AMPLY COMPLIES WITH THE REQUIREMENTS OF FED. R. CIV. P. 52 (a).

Appellant has tendered a melange of further complaints which reveals little understanding of the function and discretionary power of the District Judge and the permissible limits of appellate review in the federal system. There is no real complaint that the decision below finds no substantial support in the record. Rather much is made of the trial court's determinations as to the credibility of witnesses and the like.

There can be no doubt that the correct standard of law was applied. New York is now a strict liability state. Codling v. Paglia, 32 N.Y. 2d 330, 345 N.Y.S. 2d 461 (1973); Bolin v. The Triumph Corp., 33 N.Y. 2d 151 (1973); Velez v. Craine & Clark Lumber Corp., 33 N.Y. 2d 117 (1973). Codling (pp. 337-338) disposes of appellant's contention as to plaintiff's burden of proof as follows:

> "The uncontradicted proof was that Paglia's automobile 'went to the left' and that he 'tried to steer to the right' but that 'she locked on me or something.' 'I couldn't steer right. It went to the left and I tried to steer to the right and she wouldn't budge, she wouldn't give.' Counsel for Chrysler lay great stress on the alleged failure of proof of any specific defect in the power steering system and the inadequacy of plaintiffs' tests to prove the defect. Claim is also made that even if a defect at the time of the accident be assumed, there was no proof that the defect existed at the time the automobile left the Chrysler plant. These issues were fairly put to the jury by the trial court on the instructions (to which no exceptions were taken):

'While the burden is upon the plaintiff to prove that the product was defective and that the defect existed while the product was in the manufacturer's possession, plaintiff is not required to prove the specific defect, especially where the product is complicated in nature. Proof of necessary facts may be circumstantial. Though the happening of the accident is not proof of a defective condition, a defect may be inferred from proof that the product did not perform as intended by the manufacturer.'

'** that for the defendant Chrysler Corporation to be held liable, the defect need not be apparent at the time the product left the factory, but may be merely a latent defect or hidden which later arises and causes damage.'"

Chrysler's claims as to the genesis of the defect here were raised in Codling and thus rejected.

The Court held significantly: (p. 342)

"We accordingly hold that, under a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages."

The facts found by the Court meet the requirements of Codling. All that appellant complains of here is that some testimony was not credited or

that other testimony was given too much or too little weight. Of course, Judge Costantino saw the witnesses and it was his function to evaluate their testimony. Appellant's state court citations are completely inapposite. "In a trial without a jury, it will be presumed that the trial court relied only on proper evidence in reaching its conclusion in absence of clear showing to the contrary." (U.S. v. 396 Corp., 264 F. 2d 704, 709 (2nd Cir. 1959).

Thus the attack on the Court's quashing the Morfopoulos subpoena (Ex. N. Id.) is misdirected. The subpoena required the witness to produce the records of every case he ever testified in. The witness and counsel were antagonists of long standing. Counsel was ready to relitigate a Queens County case and reexamine the academic qualifications of the witness (134-144). The Court's refusal to tolerate a renewal of this vendetta on public time is scarcely a ground for reversal. The broad jurisdiction of a District Judge with respect to subpoenable material has been recently reaffirmed. U.S. v. Nixon, U.S. , 42 USLW 5237 (July 24, 1974); U.S. v. Berrios, F. 2d. (2nd Cir. 74-1365); Sue v. Chicago Transit Authority, 279 F. 2d 416, 419 (7th Cir. 1969); Shotkin v. Nelson, 146 F. 2d 402 (10th Cir. 1944).

The dismissal of Chrysler's counterclaim was supported by substantial evidence. Again the Court's evaluation of the credibility of witnesses

is improperly attacked. The amount of damages awarded is not subject to review. This Court is not an Appellate Division of the New York State Supreme Court.

CONCLUSION

THE JUDGMENT SHOULD BE AFFIRMED.

MARSHALL G. KAPLAN
Attorney for Plaintiff-Appellee.

STATE OF NEW YORK)

COUNTY OF KINGS)SS.:

GLORIA SHATSKY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 21 years of age and resides at 250 Ocean Parkway, Brooklyn, New York.

That on the 22nd day of August, 1974 deponent served three copies of the within Brief of Plaintiff-Appellee, each, upon Berman & Frost, Esqs., attorneys for defendant-appellant, 77 Water Street, New York, N.Y. 10005 and Markhoff Gottlieb Lazarus D'Auria & Maldonado, Esqs., attorneys for defendant-appellee, 401 Broadway, New York, N.Y. 10013, the address designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office, official depository under the exclusive care and custody of the United States post office department within the state of New York.

Sworn to before me this
22nd day of August, 1974.

Seymour Schwartz

SEYMOUR SCHWARTZ
Notary Public, State of New York
No. 31-6877800
Qualified in New York County
Commission Expires March 30 1975

Gloria Shatsky

Gloria Shatsky